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13

14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN FRANCISCO DIVISION**

17

18 **IN RE SAN FRANCISCO 49ERS DATA**  
19 **BREACH LITIGATION,**

20 This Document Relates To: All Actions

21 Case No. 3:22-cv-05138-JD

22 **PLAINTIFFS' NOTICE OF MOTION**  
23 **AND MOTION FOR PRELIMINARY**  
24 **APPROVAL OF CLASS ACTION**  
25 **SETTLEMENT; MEMORANDUM IN**  
26 **SUPPORT**

27 Date: January 9, 2025  
28 Time: 10:00 A.M.  
Courtroom: 11  
Judge: Hon. James Donato

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1           **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

2           **PLEASE TAKE NOTICE THAT** on January 2, 2025, at 10:00 AM, or as soon thereafter  
 3 as counsel may be heard, before the Honorable James Donato, at San Francisco Courthouse,  
 4 Courtroom 11, 19th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs  
 5 will and hereby do move this Court, pursuant to Federal Rule of Civil Procedure 23, for an order  
 6 granting Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.

7           Plaintiffs seek provisional certification of the Settlement Class and California Subclass,  
 8 appointment of undersigned counsel as Settlement Class Counsel, appointment of the named  
 9 Plaintiffs in the consolidated actions as Class Representatives, and preliminary approval of the  
 10 proposed Class Action Settlement.

11           Plaintiffs base their Motion for Preliminary Approval of Class Action Settlement on: this  
 12 Notice; the Memorandum of Points and Authorities filed in support thereof; the Settlement  
 13 Agreement and Release ("Settlement Agreement"); the Declaration of Plaintiffs' Counsel in  
 14 Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement  
 15 ("Attorney Decl."); the Declaration of Andrea R. Dudinsky of Kroll Settlement Administration  
 16 LLC in Connection with Preliminary Approval ("Dudinsky Decl."); all other records and papers on  
 17 file in this action; any oral argument on the Motion; and all other matters properly before the Court.  
 18 Plaintiffs seek an order pursuant to Federal Rule of Civil Procedure 23(b)(3) certifying the  
 19 Settlement Class more fully described in the Settlement Agreement, attached hereto as Exhibit 1;  
 20 preliminarily approving the Settlement as fair, reasonable, and adequate; directing notice to be  
 21 disseminated to the Settlement Class in the form and manner proposed by the parties as set forth in  
 22 the Settlement Agreement and attached to the Settlement Agreement as exhibits A and B thereto;  
 23 appointing Kroll Settlement Administration LLC to serve as the Settlement Administrator;  
 24 appointing Plaintiffs as Class Representatives and the undersigned attorneys as Class Counsel; and  
 25 setting a hearing date and schedule for final approval of the Settlement and consideration of Class  
 26 Counsel's forthcoming motion for an award of fees, costs, expenses, and service awards.

27           ///

1       **I. INTRODUCTION**

2       Plaintiffs present a proposed class action settlement that would resolve their claims against  
 3 Defendant 49ers Football Company LLC (“49ers”). In exchange for Plaintiffs and Settlement Class  
 4 Members releasing their claims arising from the 2022 Data Incident, Defendant will fund a non-  
 5 reversionary \$610,000.00 Settlement Fund. Out of such fund, Settlement Class Members will be  
 6 able to have any documented out-of-pocket expenses up to \$7,500 reimbursed provided they were  
 7 more likely than not caused by the Data Incident. Additionally, all settlement class members shall  
 8 receive a *pro-rata* share of the Settlement Remainder, except that each California Settlement  
 9 Subclass Member shall be allocated three shares of the Settlement Remainder in recognition of  
 10 their release of their statutory claims against Defendant.

11       As explained below, Plaintiffs believe the proposed Settlement is fair, reasonable, adequate,  
 12 and an excellent result for the Class. Therefore, Plaintiffs respectfully request that the Court (1)  
 13 certify the proposed Settlement Class and California Settlement Subclass under Rule 23(b)(3), (2)  
 14 preliminarily approve the proposed Settlement, and (3) approve the proposed notice plan.

15       **II. ISSUES TO BE DECIDED**

16       1.       Whether the Settlement Class and California Subclass should be provisionally  
 17 certified; 2) whether the proposed Class Action Settlement should be preliminarily approved; 3)  
 18 whether notice should issue to the Settlement Class and California Subclass; 4) whether the named  
 19 Plaintiffs in the consolidated actions should be named as Class Representatives, and 5) whether  
 20 undersigned Plaintiffs’ Counsel should be appointed as Settlement Class Counsel.

21       **III. STATEMENT OF FACTS AND SUMMARY OF PROPOSED SETTLEMENT**

22       This case arises from a ransomware attack involving Defendant’s computer systems.  
 23 Plaintiffs allege that on February 6, 2022, cybercriminals bypassed the 49ers’ security systems  
 24 undetected and accessed PII as part of a “ransomware” attack (“Data Incident”). Plaintiffs further  
 25 allege that, as a result of the Data Incident, the criminals gained access to Plaintiffs’ and “other  
 26 consumers[”] personal information, including but not limited to name, date of birth, and Social  
 27 Security Number” (collectively, “PII”).

1           After discovering the Data Incident, the 49ers notified approximately 20,930 individuals of  
 2 the Data Incident. 49ers offered individuals who also had their social security or driver's license  
 3 number impacted one year of free credit monitoring.

4           Individuals, including Plaintiffs, were mailed notices of the Data Incident in or around  
 5 August 31, 2022 and September 1, 2022. On September 9, 2022, Plaintiff Samantha Donelson filed  
 6 a lawsuit asserting claims against the 49ers relating to the Data Incident. On December 22, 2022,  
 7 Plaintiff James Sampson filed a separate lawsuit asserting claims against the 49ers relating to the  
 8 Data Incident. On January 10, 2023, Plaintiff Katherine Finch filed a separate lawsuit asserting  
 9 claims against the 49ers relating to the Data Incident. On February 23, 2023, the Court consolidated  
 10 these matters, and on April 4, 2023, Plaintiffs filed the operative amended class-action complaint  
 11 in the United States District Court for the Northern District of California. (ECF No. 28). The case  
 12 is titled *In re San Francisco 49ers Data Breach Litigation*, Case No. 2:22-cv-05138-JD (N.D. Cal.)  
 13 (the "Litigation"). Defendant filed a Motion to Dismiss Plaintiffs' Complaint on December 8, 2023.  
 14 (ECF No. 42). On August 15, 2024, this Court issued an Order granting Defendant's motion only  
 15 as to Plaintiffs' causes of action for negligence *per se* and for violations of the Georgia Uniform  
 16 Deceptive Trade Practices Act, Ga. Code Ann. § 10-1-370 *et seq.* but denying it as to all other  
 17 causes of action. (ECF No. 58).

18           From the onset of the Litigation, and over the course of nearly two years, the Parties have  
 19 engaged in settlement negotiations. The Parties participated in a formal mediation presided over by  
 20 Bruce Friedman, Esq. on January 23, 2023. As a result of these negotiations and the mediation, the  
 21 Parties reached an initial settlement, which this Court recommended certain changes to. (ECF No.  
 22 35). The Parties engaged in continued negotiations over the course of the following months and, as  
 23 a result of those negotiations, have reached the instant Settlement which Plaintiffs believe to be  
 24 advantageous to the Settlement Class.

25 **IV. SETTLEMENT TERMS**

26 **A. Settlement Class Definition**

27           The Settlement Class is defined as follows:

1 All United States residents who were mailed notice by the 49ers that their personal  
 2 and/or financial information was impacted in a data incident occurring between  
 3 February 6, 2022 and February 11, 2022.

4 Settlement Agreement § 1.28 (“S.A.”). The following persons are excluded from the class  
 5 definition: “(i) the 49ers, the Related Entities, and their officers and directors; (ii) all Settlement  
 6 Class Members who timely and validly request exclusion from the Settlement Class; (iii) any judges  
 7 assigned to this case and their staff and family; and (iv) any other Person found by a court of  
 8 competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the  
 9 criminal activity occurrence of the Data Incident or who pleads *nolo contendere* to any such  
 10 charge.” *Id.* The Settlement Class includes 20,930 individuals. *Id.* at p. 1. The California Settlement  
 11 Subclass includes:

12 All persons residing in California who were mailed notification of  
 13 the Data Incident from the 49ers at a California address.

14 *Id.* § 1.2.

15 The proposed Settlement Class and California Settlement Subclass are substantially similar  
 16 to the class definitions proposed in the First Amended Consolidated Complaint. *See* ECF No. 28, ¶  
 17 78. The only substantive difference is membership in the settlement classes is limited to individuals  
 18 whom the 49ers already mailed notice of the data breach. *See id.*; ECF Nos. 43, 48, and 53.

19 **B. Scope of Release**

20 Members of the settlement classes who do not opt-out will release “any and all past, present,  
 21 and future claims” against the 49ers that concern or arise from “the Data Incident and alleged theft  
 22 of personal information or the allegations, transactions, occurrences, facts, or circumstances alleged  
 23 in otherwise described in this Litigation.” *Id.* § 1.23; *see also id.* § 6.1. This is a standard release,  
 24 covering only those claims that arise from the data breach.

25 **C. Settlement Benefits**

26 The 49ers have agreed to establish a six hundred ten thousand dollar (\$610,000) non-  
 27 reversionary cash settlement fund (the “Settlement Fund”), which will be used first to pay the  
 28 approved costs of settlement administration and notice, the approved attorneys’ fees and expenses,

1 and any approved service awards. The remaining funds will then be applied until exhausted in the  
 2 following order: (1) claims for out-of-pocket loss reimbursement up to \$7,500 per valid claim; (2)  
 3 *pro rata* cash payments exhausting the Settlement Remainder with all Settlement Class Members  
 4 receiving one share, but each California Settlement Subclass Member receiving two additional  
 5 shares, for a total of three shares. *Id.* § 2.

6 **1. Relief Under the Settlement**

7 *Ordinary Expense Reimbursement.* All Settlement Class Members will be eligible to receive  
 8 a cash payment for up to \$7,500 in compensation for out-of-pocket losses. S.A. § 2.2. This includes  
 9 reimbursement for any actual, documented, and unreimbursed monetary losses that were more  
 10 likely than not caused by the Data Incident occurring between February 6, 2022 and the Claims  
 11 Deadline provided that the Settlement Class Member made reasonable efforts to avoid, or seek  
 12 reimbursement for, the loss, including but not limited to exhaustion of all available credit  
 13 monitoring insurance and identity theft insurance. *Id.*

14 *Settlement Remainder.* The Settlement Remainder shall be distributed to Settlement Class  
 15 Members on a *pro rata* basis, except that each California Settlement Subclass Member shall be  
 16 allocated three shares of the Settlement Remainder. S.A. § 2.5. The payment of the Settlement  
 17 Remainder shall be in addition to, and independent of, other compensation or relief provided by the  
 18 Settlement. *Id.*

19 *Business Practice Changes.* Plaintiffs have received assurances in the form of a confidential  
 20 declaration (suitable for filing under seal if this Court so directs) that the 49ers have implemented  
 21 or will implement certain reasonable steps to adequately secure its systems and environments. *Id.*  
 22 § 2.6

23 **2. Comparison to Full Recovery**

24 The settlement benefits compare favorably to the result that  
 25 Class Members could obtain at trial.

26 As an initial matter, the Settlement and its structure, allowing those who have suffered out  
 27 of pocket losses to claim benefits commensurate with those losses reflect the odds that a particular  
 28

1 victim of the data breach will suffer the worst case scenario of fraud or identity theft. According to  
 2 the Identity Theft Resource Center's 2022 Annual Report, there are over 422 million individual  
 3 exposures of personal data in the United States.<sup>1</sup> Attorney Decl. ¶ 17. According to Experian, 1.43  
 4 million individuals suffered some measure of identity theft in the last year<sup>2</sup>. If every one of those  
 5 identity thefts was the result of a data breach, then it follows that the odds that a particular exposure  
 6 of data will result in an identity theft is 0.39 percent. *Id.* Given that there are 20,930 individuals in  
 7 the Settlement Class here, this estimate suggests that the maximum number of individuals who will  
 8 suffer identity theft of some kind from the incident at issue is 71. *Id.*

9 Moreover, the structure selected here, allowing reimbursement for actual losses for those  
 10 who suffered them, and then providing for direct payments for what amounts to nominal damages  
 11 for all others, is fair and reasonable in this case because it approximates a possible distribution  
 12 process following a favorable jury verdict. In the rare case where a class action proceeds to  
 13 judgment, the defendant has a due process right to contest certain issues that may affect its total  
 14 liability. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 672 (7th Cir. 2015) (“In all cases, the  
 15 defendant has a right not to pay in excess of its liability and to present individual defenses, but both  
 16 rights are protected by other features of the class device and ordinary civil procedure.”). Both Rule  
 17 23 and due process allow those proceedings to occur in a post-judgment claims administration  
 18 process before a special master. *See Brown v. DirecTV, LLC*, 562 F. Supp. 3d 590, 604 (C.D. Cal.  
 19 2021).

20 Data breach cases may present a situation where a claims process is necessary even in the  
 21 event of a favorable jury verdict. Plaintiffs assert that all class members necessarily suffered an  
 22 injury by virtue of the improper disclosure of their PII. *See Mehta v. Robinhood Fin. LLC*, 2021  
 23 U.S. Dist. LEXIS 253782, at \*19 (N.D. Cal. May 6, 2021) (holding that “Plaintiffs adequately  
 24 allege damages,” including from “loss of control over the use of their identity” and other “privacy

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25  
 26 <sup>1</sup> This is greater than the number of people in the United States, as some individuals had their  
 27 information exposed multiple times.  
 28 <sup>2</sup> <https://www.experian.com/blogs/ask-experian/identity-theft-statistics/> (last accessed June 7,  
 2023).

1       injuries"); *Flores-Mendez v. Zoosk, Inc.*, 2021 U.S. Dist. LEXIS 18799, at \*11 (N.D. Cal. Jan. 30, 2021) (similar). However, the quantum of their damages is highly variable; some, though not all, will likely suffer varying degrees of unnecessary expenses, out-of-pocket losses, and so forth. This potential issue "of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013). What it can do is result in class members being required to file claims before they can recover. *See Brown*, 562 F. Supp. 3d at 604 n.17. If class members may have been required to file a claim even if they had won at trial, then it is reasonable to structure this Settlement in a manner that approximates such a result.

9           If Plaintiffs had prevailed at trial, they would have sought recovery for their out-of-pocket 10      losses, nominal damages, and for statutory damages under the California Consumer Privacy Act 11      ("CCPA"). Plaintiffs believe that the \$7,500 cap for out-of-pocket loss reimbursement will likely 12      make each class member whole. According to the Federal Trade Commission's Identity Theft 13      Survey Report, 85% of identity theft victims report the misuse of existing accounts and 17% of 14      victims report new accounts being opened in their name. Attorney Decl., ¶ 51. For those identity 15      theft victims who had misuse of existing accounts, the average out-of-pocket loss was \$500, while 16      the average loss for improperly opened accounts was \$1,200. *Id.* Moreover, only a maximum of 17      6% of those who had improper use of existing accounts had out-of-pocket losses of \$1,000 or above, 18      and 16% of those that had accounts opened in their name had losses of \$1,000 or above. *Id.* Thus, 19      while Plaintiffs acknowledge that there could be individuals who would be able to achieve greater 20      recovery if this matter went to trial, the overwhelming number of eligible Class Members will have 21      the opportunity to be made whole by this Settlement.

22           Had Plaintiffs won a judgment, they also would have sought recovery for their loss of 23      privacy, through statutory damages of \$100–\$750 for California Settlement Subclass members 24      (CAL. CIV. CODE § 1798.150(a)(1)(A)) and by requesting an award from the jury that compensates 25      the class for the value of their privacy injuries, *see, e.g.*, *Flores-Mendez*, 2021 U.S. Dist. LEXIS 26      18799, at \*11. The structure here, awarding California Settlement Subclass members three shares 27      of the *pro rata* distribution provides for benefits to compensate all Settlement Class Members for 28

1 their loss of privacy and makes a cash payment in recognition of the California Settlement Subclass  
 2 members. While the payment is unlikely to equal the statutory damages had this case gone to trial  
 3 and been won by Plaintiffs, the risk and expense of taking this case through to trial is substantial.

4 In light of these complexities and difficulties, the Settlement strikes a balance between  
 5 providing recovery to those individuals who have suffered concrete harm, while providing some  
 6 measure of recovery for all class members whose claims, although likely of reduced value, are not  
 7 valueless.

8 **D. Other Cases Affected by the Settlement**

9 Class Counsel is not aware of any other cases affected by the proposed settlement.

10 **E. Reversion to Defendant**

11 This case involves the creation of a non-reversionary Settlement Fund which shall be  
 12 exhausted by the Settlement Remainder payment, no funds shall ever revert to Defendant.

13 **F. Notice and Claims Administration**

14 All fees and costs for providing notice to the Settlement Class, together with the costs of  
 15 Claims Administration shall be paid from the Settlement Fund. S.A. § 3.2. Notice will be given to  
 16 the Settlement Class via individual notice, which will be given mailing the Short-Form notice  
 17 (attached to the Settlement Agreement as **Exhibit A**) to postal addresses associated with the  
 18 Settlement Class Members.

19 A Long Notice (attached to the Settlement Agreement as **Exhibit B**) will also be posted on  
 20 the settlement website, along with other important documents such as the Claim form; the  
 21 Settlement Agreement, a copy of these preliminary approval filings; the operative Amended Class  
 22 Action Complaint; and any other materials agreed upon by the Parties and/or required by the Court.  
 23 S.A. § 3.2(b). The notice documents are clear and concise and directly apprise Class Members of  
 24 all the information they need to know to make a claim or to opt-out or object to the Settlement.  
 25 FED. R. CIV. P. 23(c)(2)(B).

26 Furthermore, a toll-free number with interactive voice response, FAQs, and an option to  
 27 speak to a live operator will be made available to address Class Members' inquiries. S.A. § 3.2(e).

1                   Kroll Settlement Administration, a nationally recognized and well-regarded class action  
 2 settlement administrator, has been retained to serve as Claims Administrator, subject to the Court's  
 3 approval. S.A. § 1.5. The parties selected Kroll after soliciting multiple bids. Attorney Decl. 37.

4                   The Claim Form (attached to the Settlement Agreement as **Exhibit C**) implemented in this  
 5 case is very similar to that which Class Counsel have used in similar class action settlements  
 6 involving data breach incidents with relatively similar benefits. Attorney Decl. ¶ 32. Class Counsel  
 7 recommend the content of the Claim Form in this case because of Class Counsel's experience in  
 8 successfully soliciting claims and allocating settlement benefits in similar class action cases. *Id.*

9                   Class Counsel expects that the claims-rate will be between 0.5% and 9% (i.e., between 105  
 10 and 1,884). This claims-rate would not be unusual for a settlement such as this. *See In re Facebook*  
 11 *Biometric Info. Priv. Litig.*, No. 15-CV-03747-JD, 2021 WL 757025, at \*2 (N.D. Cal. Feb. 26,  
 12 2021) (noting that consumer class actions typically have a claims rate between 4% and 9%). Nor  
 13 would it be unusual for data breach settlements. *In re Anthem Data Breach*, 327 F.R.D. 299, 329  
 14 (N.D. Cal. 2018) (1.8% claims rate); *In re Premera Blue Cross Data Breach*, Case No. 3:15-md-  
 15 02633 (D. Or.) (7.81% claims rate); *Gaston v. Fabfitfun*, Case No. 2:20-cv-09534 (C.D. Cal.)  
 16 (5.27% claims rate).

17                   **G. Attorneys' Fees and Service Awards**

18                   The Settlement also provides that Class Counsel will apply to this Court for an order  
 19 awarding up to twenty-five percent (25%) of the \$610,000.00 Settlement Fund in attorneys' fees  
 20 (\$152,500.00), and for reimbursement of reasonable costs and expenses and each of the  
 21 Representative Plaintiffs is eligible to seek a Service Award in the amount of \$2,500.00. S.A. §§  
 22 7.2–7.3.

23                   Class Counsel's projected attorneys' fees request of \$152,500.00 will be justified by a Class  
 24 Counsel's accrued lodestar, which includes the time spent investigating the Data Incident pre-suit,  
 25 post-suit informal discovery and investigation, extensive settlement negotiations over the course of  
 26 approximately two years, briefing and arguing Defendants' motion to dismiss, communicating with  
 27 Plaintiffs, finalizing the terms of the Settlement Agreement, drafting and filing preliminary

1 approval filings, supplemental filing, this motion for preliminary approval, and continuing to  
 2 communicate with Plaintiffs. Attorney Decl. ¶ 39. Class Counsel anticipate accruing additional  
 3 lodestar totals to get this case through settlement administration, final approval, and any other  
 4 hearings the Court may request. *Id.*

5 **V. ARGUMENT**

6 **A. The Court should certify the Settlement Class.**

7 The parties have agreed (for settlement purposes only) to certification of the Settlement  
 8 Class and California Settlement Subclass, *see S.A. § 2.8*, but the Court must still determine whether  
 9 each of Rule 23(a)'s requirements and at least one of Rule 23(b)'s requirements are satisfied. *See*  
 10 *Amchem Prods. v. Windsor*, 521 U.S. 591, 622 (1997). That standard is satisfied here.

11 **1. The Proposed Class is sufficiently numerous.**

12 Class certification under Rule 23(a)(1) is appropriate where a class contains so many  
 13 individuals "that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1).  
 14 "Impracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining  
 15 all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th  
 16 Cir. 1964) (citation omitted). "[W]here the number of class members exceeds forty, and particularly  
 17 where class members number in excess of one hundred, the numerosity requirement will generally  
 18 be found to be met." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 583 (N.D. Cal. 2015)  
 19 (citation omitted). There are 20,930 members of the Settlement Class and approximately 9,620  
 20 members of the California Settlement Subclass. S.A. at p. 2. This is well over the threshold to  
 21 establish numerosity.

22 **2. There are questions of law and fact common to the Class.**

23 Rule 23(a)(2) requires that "there are questions of law or fact common to the class." FED.  
 24 R. CIV. P. 23(a)(1). This standard may be satisfied by "even a single common question." *Wal-Mart*  
 25 *Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (cleaned up). Here, the central question raised by  
 26 the litigation is whether Defendant took reasonable steps to protect the personal information of  
 27 class members that resided in Defendant's systems. That issue depends on the acts and omissions

1 of Defendant and thus is a question common to the class. *See Hashemi v. Bosley, Inc.*, 2022 U.S.  
2 Dist. LEXIS 119454, at \*7 (C.D. Cal. Feb. 22, 2022) (finding commonality where “Plaintiffs  
3 maintain that there are multiple common question of law or fact—i.e., whether Defendant breached  
4 its duty to safeguard the Class's PII, whether Defendant unreasonably delayed in notifying the Class  
5 about the data breach, and whether Defendant's security measures or lack thereof violated various  
6 statutory provisions.”); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS  
7 129939, at \*22 (N.D. Cal. July 20, 2020) (finding commonality in a data breach case, as “[i]n the  
8 case's current posture, whether Yahoo employed sufficient security measures to protect the  
9 Settlement Class Members' Personal Information from the Data Breaches lies at the heart of every  
10 claim.”); *Sung v. Schurman Fine Papers*, 2018 U.S. Dist. LEXIS 40379, at \*9–10 (N.D. Cal. Mar.  
11 11, 2018) (finding commonality in a data breach case where “[t]he lawsuit involves a single data  
12 breach”). Therefore, commonality is satisfied.

3. The Class Representatives' claims and defenses are typical of those they seek to represent.

“Typicality requires a showing that the named plaintiffs are members of the class they represent and that their claims are ‘reasonably co-extensive with those of absent class members,’ but not necessarily ‘substantially identical.’” *Hashemi*, 2022 U.S. Dist. LEXIS 119454, at \*7 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). “The test of typicality ‘is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.’” *Id.* at \*7-8 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (internal citations omitted)).

22 As with commonality, typicality is routinely met in data breach cases, as both the class  
23 representative and the other members of the class were subject to the same event that gives rise the  
24 claims in the case, and thus subject to the same consequences of the allegedly improper data  
25 protection. *See In re Yahoo!*, 2020 U.S. Dist. LEXIS 129939, at \*25 (“the Settlement Class  
26 Representatives, like the Settlement Class as a whole, were all Yahoo users who allegedly either  
27 suffered identity theft and/or were placed at substantial risk for identity theft. Accordingly, Yahoo’s

1 allegedly inadequate data security harmed the Settlement Class Representatives in a common way  
 2 as the rest of the Settlement Class Members."); *Sung*, 2018 U.S. Dist. LEXIS 40379, at \*10 (finding  
 3 typicality where “[a]ll Settlement Employee Class Members allege that they provided PII to SRG  
 4 as a condition of employment, and they may have provided PII for their spouses or other  
 5 dependents.”). Similarly here, the claims of Plaintiffs are the same as those of the other members  
 6 of the class, as they stem from the same Incident and are the result of the same alleged action (or  
 7 lack of action) on the part of Defendant.

8 **4. Class counsel and the Class Representatives are adequate.**

9 Rule 23(a)(4) is satisfied if “the representative parties will fairly and adequately protect the  
 10 interests of the class.” FED. R. CIV. P. 23(a)(4). The Court must measure the adequacy of  
 11 representation by two standards: “(1) Do the representative plaintiffs and their counsel have any  
 12 conflicts of interest with other class members, and (2) will the representative plaintiffs and their  
 13 counsel prosecute the action vigorously on behalf of the class?” *In re Wireless Facilities*, 253  
 14 F.R.D. at 611 (quoting *Staton*, 327 F.3d at 958). Class Counsel are experienced data privacy  
 15 litigators with the knowledge to effectively evaluate and prosecute this case. Attorney Decl. ¶ 45.  
 16 The class representatives diligently represented the class by taking the initiative to commence this  
 17 litigation, reviewing and approving the pleadings, and staying abreast of developments in the case.  
 18 Attorney Decl. at ¶ 43. Therefore, adequacy is satisfied.

19 **5. Common questions predominate, such that classwide resolution is  
 20 superior to individual adjudication.**

21 Certification of a settlement class is proper under Rule 23(b)(3) if “questions of law or fact  
 22 common to class members predominate over any questions affecting only individual members, and  
 23 that a class action is superior to other available methods for fairly and efficiently adjudicating the  
 24 controversy.” FED. R. CIV. P. 23(b)(3).<sup>3</sup> Both predominance and superiority are satisfied here.

25 When evaluating predominance, courts evaluate “whether the common, aggregation-

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26 <sup>3</sup>Because Plaintiffs seek certification of a settlement class, the Court need not consider  
 27 manageability concerns. *See Amchem*, 521 U.S. at 619–20; *In re Hyundai & Kia Fuel Economy*  
 28 *Litig.*, 926 F.3d 539, 558 (9th Cir. 2019) (en banc).

1 enabling, issues in the case are more prevalent or important than the non-common, aggregation-  
 2 defeating, individual issues.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). That  
 3 test is satisfied here because “Plaintiffs’ case for liability depends, first and foremost, on whether  
 4 [Defendant] used reasonable data security to protect Plaintiffs’ personal information.” *In re*  
 5 *Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 312 (N.D. Cal. 2018). As a result, “the focus” of  
 6 this case is “on the extent and sufficiency of the specific security measures that [Defendant]  
 7 employed,” which presents “the precise type of predominant question that makes class-wide  
 8 adjudication worthwhile.” *Id.* Therefore, predominance is satisfied. *See In re Yahoo!*, 2020 U.S.  
 9 Dist. LEXIS 129939, at \*37–38 (applying same reasoning as *Anthem*); *Sung*, 2018 U.S. Dist.  
 10 LEXIS 40379, at \*11 (finding predominance because “[a]ll claims arise from one data breach, and  
 11 liability can be determined on a class-wide basis”).

12 Classwide resolution is also superior to individual adjudication. When evaluating  
 13 superiority, courts ask whether “the aggregation of these claims can be expected to save time, effort  
 14 and expense, and to promote uniformity without sacrificing procedural fairness,” such that “a class  
 15 action is superior to other available methods for fairly and efficiently adjudicating the controversy.”  
 16 *Toolajian v. Air Methods Corp.*, 2020 U.S. Dist. LEXIS 250904, at \*17 (N.D. Cal. Apr. 24, 2020)  
 17 (internal quotation marks and citations omitted). “Where recovery on an individual basis would be  
 18 dwarfed by the cost of litigating on an individual basis, [the superiority] factor weighs in favor of  
 19 class certification.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010).  
 20 Here, individual damages are relatively modest, as it is unlikely that many class members suffered  
 21 significant out-of-pocket losses. *See* Summary of Proposed Settlement, *supra*, Part I.C.2. This  
 22 makes it unlikely that a class member would retain their own attorney to pursue an individual claim.  
 23 Moreover, even if class members were to pursue their claims individually, the efficiency gain  
 24 obtained from having a single resolution of all the common issues dwarfs the benefit of allowing  
 25 20,930 individuals to pursue their own cases.

26 Therefore, the Court should certify the Settlement Class and California Settlement Subclass  
 27 under Rule 23(b)(3).

1                   **B.       The Court Should Preliminarily Approve the Proposed Settlement.**

2                   Courts may approve a class settlement if it is “fair, reasonable, and adequate.” FED. R. CIV.  
 3 P. 23(e)(2). Relevant considerations include whether: (A) “the class representatives and class  
 4 counsel have adequately represented the class”; (B) “the proposal was negotiated at arm’s length”;  
 5 (C) “the relief provided for the class is adequate”; and (D) “the proposal treats class members  
 6 equitably relative to one another.” *Id.* At the preliminary approval stage, the question is whether  
 7 “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations,  
 8 has no obvious deficiencies, does not improperly grant preferential treatment to class  
 9 representatives or segments of the class, and falls with the range of possible approval.” *In re*  
 10 *Facebook Biometric Info. Privacy Litig.*, 2020 U.S. Dist. LEXIS 151269, at \*9 (N.D. Cal. Aug. 19,  
 11 2020) (quotation marks omitted). That standard is satisfied here.

12                   **1.       The Class was adequately represented.**

13                   When considering adequacy of representation under Rule 23(e)(2)(A), courts ask two  
 14 questions: “(a) do the named plaintiffs and their counsel have any conflicts of interest with other  
 15 class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously  
 16 on behalf of the class?” *In re MyFord Touch Consumer Litig.*, 2019 U.S. Dist. LEXIS 53356, at  
 17 \*24 (N.D. Cal. Mar. 28, 2019) (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th  
 18 Cir. 2000)). Here, and as discussed above, neither class counsel nor the class representatives have  
 19 any conflicts of interest. Moreover, class counsel vigorously represented the interests of the class  
 20 during the initial mediation, and in the subsequent negotiations, including those that followed both  
 21 the oral argument on Defendant’s motion to dismiss and this Court’s order on said motion and  
 22 obtained confirmatory discovery to ensure they had sufficient information to evaluate the merits of  
 23 the case. *See* S.A. § 2.7; *Conti v. Am. Honda Motor Co.*, 2022 U.S. Dist. LEXIS 1561, at \*24 (C.D.  
 24 Cal. Jan. 4, 2022) (noting that adequacy may depend on whether class counsel “had an adequate  
 25 information base” to make an informed decision regarding settlement). This factor weighs in favor  
 26 of approval.

27                   ///

## 2. The settlement was negotiated at arm's length.

2 Another important consideration is whether the settlement “was negotiated at arm’s length.”  
3 FED. R. CIV. P. 23(e)(2)(B). Although this factor does not create a presumption of fairness, *see*  
4 *Saucillo v. Peck*, 25 F.4th 1118, 1132 (9th Cir. 2022), “such negotiations can weigh in favor of  
5 approval,” *Community Res. For Indep. Living v. Mobility Works of Cal.*, 533 F. Supp. 3d 881, 888  
6 (N.D. Cal. 2020). *See also Rodriguez v. W. Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)  
7 (“We put a good deal of stock in the product of an arms-length, non-collusive, negotiated  
8 resolution.”). In this case, the parties’ interactions were at all times adversarial. The parties spent  
9 considerable time and effort negotiating the settlement, including through private mediation with  
10 Bruce Friedman, Esq of JAMS, and subsequent negotiations spanning over a year and a half. *See*  
11 S.A. at p. 2. Class Counsel and Counsel for 49ers are well-versed in handling data breach class  
12 actions such as this one and fully understand the values recovered in similar cases. Therefore, the  
13 Court can be assured that the negotiations were not collusive.

When analyzing Rule 23(e)(2)(B), courts also ask whether any of the *Bluetooth* factors are present, which could suggest the presence of collusion. *See Cottle v. Plaid Inc.*, 340 F.R.D. 356, 376 (N.D. Cal. 2021) (citing *Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2021)); *see also In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). “These *Bluetooth* factors are (1) when counsel receive a disproportionate distribution of the settlement or when the class receives no monetary distribution but class counsel are amply rewarded; (2) when the payment of attorneys’ fees is separate and apart from class funds; and (3) when the parties arrange for benefits that are not awarded to revert to the defendants rather than being added to the class fund.” *Cottle*, 340 F.R.D. at 376 (quotation marks omitted) (quoting *Briseno*, 998 F.3d at 1023). None of these factors are at issue here, with payment of attorneys’ fees coming from the Settlement Fund, there being no reversion of any funds to Defendant, and the Settlement Agreement countenancing Plaintiffs requesting, at most, twenty-five percent (25%) of the Settlement Fund. Class Counsel’s fee request is well within the range of reasonableness for settlements of this nature and size. “25% [is] considered the benchmark” in the Ninth Circuit. *Pauley v. CF Entm’t*, No. 2:13-

1 CV-08011-RGK-CW, 2020 WL 5809953, at \*3 (C.D. Cal. July 23, 2020), *citing Powers v. Eichen*,  
 2 229 F.3d 1249, 1256 (9th Cir. 2000). The Ninth Circuit has found fee awards of 1/3 of the fund to  
 3 be reasonable. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). Class  
 4 Counsel's projected attorneys' fees request of \$152,500.00 will also be justified by Class Counsel's  
 5 accrued lodestar, which includes the time spent investigating the Data Incident pre-suit, post-suit  
 6 information discovery and investigation, extensive multi-year long settlement negotiations, briefing  
 7 and successfully defeating Defendant's Motion to Dismiss (in part), finalizing the terms of the  
 8 Settlement Agreement, drafting and filing preliminary approval filings, and continuing to  
 9 communicate with Plaintiffs. Attorney Decl. ¶39.

10 Therefore, this Settlement was non-collusive and negotiated at arm's length.

11 **3. The settlement provides adequate relief.**

12 Rule 23(e)(2)(C) requires courts to consider whether "the relief provided for the class is  
 13 adequate, taking into account: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness  
 14 of any proposed method of distributing relief to the class, including the method of processing class-  
 15 member claims; (iii) the terms of any proposed award of attorney's fees, including timing of  
 16 payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." FED. R. CIV. P.  
 17 23(e)(2)(C). All of those factors support approval in this case.

18 *Cost, Risk, and Delay of Trial and Appeal.* While Plaintiffs are confident of the ultimate  
 19 outcome of the case, they face several challenges going forward.

20 On the merits, if they were to proceed to litigate their claims through trial, Plaintiffs would  
 21 encounter risks in obtaining and maintaining certification of the class. The class has not yet been  
 22 certified, and Defendant will certainly oppose certification if the case proceeds. Thus, Plaintiffs  
 23 "necessarily risk losing class action status." *Grimm v. Am. Eagle Airlines, Inc.*, 2014 WL 1274376,  
 24 at \*10 (C.D. Cal. Sept. 24, 2014). Class certification in contested consumer data breach cases is not  
 25 common. *See, e.g., Brinker*, 2021 WL 1405508, at \*14; *Smith v. Triad of Ala., LLC*, No. 1:14-CV-  
 26 324-WKW, 2017 WL 1044692, at \*13 (M.D. Ala. Mar. 17, 2017) (certifying negligence class in  
 27 data-breach suit), *aff'd on reconsideration*, 2017 WL 3816722 (M.D. Ala. Aug. 31, 2017); *Kostka*

1 *v. Dickey's Barbecue Restaurants, Inc.*, 2022 WL 16821665 (N.D. Tex. Nov. 8, 2022) adopting  
2 report and recommendation 2022 WL 16821685 (N.D. Tex. Oct. 14, 2022) (recommending  
3 certification class claiming CCPA violations). While certification of additional consumer data  
4 breach classes may well follow, it still remains a substantial risk for Plaintiffs in this case.

5 In addition, class certification and summary judgment motions will take, at a minimum, a  
6 year to brief, and to obtain rulings from the Court. While summary judgment might have been able  
7 to narrow some of the legal questions, it is highly likely that a jury would have to decide whether  
8 or not Defendant exercised proper care in protecting its data. This means that a jury trial could be  
9 held no earlier than the early portion of 2026. Moreover, to the best of Class Counsel’s knowledge,  
10 no data breach case has gone to trial. As such, a trial of on the merits would be truly uncharted  
11 territory, making the risks difficult to fully evaluate by any party. This is on top of the complexities  
12 and risks of class trials that, while manageable, are more significant than a single plaintiff litigation.

13 Following the Northern District's Procedural Guidance for Class Action Settlements, Class  
14 Counsel compare this settlement to a recent similar settlement where some of them (in addition to  
15 other attorneys) participated as counsel for plaintiffs. In *Bitmouni v. Paysafe Payment Processing*  
16 *Solutions, LLC*, No. 3:21-cv-00641-JCS (N.D. Cal.), over roughly 91,000 individuals had their PII  
17 compromised in a 2020 data breach. Like this case, *Bitmouni* was resolved on a non-reversionary  
18 common fund basis. There, a settlement fund of \$2,000,000 was created, representing a recovery  
19 of approximately \$22 per Class Member. Here the \$610,000.00 Settlement Fund represents a  
20 recovery of approximately \$29 per Settlement Class Member, a substantially better result for the  
21 Class than in *Bitmouni*. United States Magistrate Judge Joseph R. Spero granted preliminary  
22 approval of the class action settlement in *Bitmouni* on August 1, 2023 and final approval on  
23 February 2, 2024. Because the Settlement forged for Plaintiffs and Class Members here provides  
24 Settlement benefits consistent with and better than those that were preliminarily and finally  
25 approved in *Bitmouni*, Plaintiffs and the Class respectfully request that the Court grant preliminary  
26 approval of class action settlement in this case.

27 | //

1                   *Distribution Method.* The claims process is simple, straightforward, and equitable. The  
 2 Claim Form is simple and easy to understand, and it may be submitted in paper or online. *See*  
 3 Exhibit C; S.A. § 2.2. Class members seeking reimbursement for out-of-pocket losses need only  
 4 submit reasonable documentation showing that they actually incurred the expenses and that they  
 5 have a plausible connection to the data breach. S.A. § 2.2. Class Members need not submit any  
 6 documentation or make any claim in order to receive the *pro rata* Settlement Remainder payment.  
 7 *Id.* § 2.5. Any disputes over the validity of a claim will be resolved by a neutral referee. S.A. § 2.4.  
 8 The claim process is necessary to determine what out-of-pocket expenses Settlement Class  
 9 Members are seeking reimbursement for and their validity.

10                  *Attorney's Fees.* Class Counsel intend to request an award of up to \$152,000.00. S.A. § 7.2.  
 11 This amount was negotiated only after the substantive terms of the Settlement were agreed upon,  
 12 and the Settlement is not contingent upon an award of fees. *See* S.A. §§ 7.1, 7.5; *Tarlecki v. Bebe*  
 13 *Stores, Inc.*, 2009 WL 3720872, at \*2 (N.D. Cal. Nov. 3, 2009) (noting that “the approval of the  
 14 settlement agreement as a whole does not depend on the quantum of the fees”). Class Counsel  
 15 submits that this request is reasonable under the percentage method and when cross-checked against  
 16 their lodestar. Class Counsel will address their potential fees in a separate motion that substantiates  
 17 the reasonableness of their requests.

18                  *Rule 23(e)(3) Agreement.* The Parties did not make any side agreements subject to  
 19 disclosure under FED. R. CIV. P. 23(e)(3).

20                  **4. The settlement treats Class Members equitably.**

21                  When considering whether the settlement “treats class members equitably relative to each  
 22 other,” FED. R. CIV. P. 23(e)(2)(D), courts seek “to ensure that similarly situated class members are  
 23 treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they  
 24 were similarly situated,” *Mandalevy v. Bofi Holding, Inc.*, 2022 U.S. Dist. LEXIS 89205, \*28 (S.D.  
 25 Cal. Mar. 17, 2022) (quoting 4 William Rubenstein, *Newberg on Class Actions* § 13:56 (5th ed.  
 26 2020)). “Matters of concern could include whether the apportionment of relief among class  
 27 members takes appropriate account of differences among their claims, and whether the scope of the  
 28

1 release may affect class members in different ways that bear on the apportionment of relief.” FED.  
 2 R. CIV. P. 23, 2018 advisory committee note.

3 The Settlement recognizes that California Settlement Subclass members had claims for  
 4 statutory damages not available to class members in other states, and thus provides them with  
 5 additional shares of the *pro rata* Settlement Remainder payment. S.A. § 2.5. This is precisely the  
 6 type of difference that settlements must take into account. *See Loreto v. Gen. Dynamics Info. Tech.,*  
 7 *Inc.*, 2021 U.S. Dist. LEXIS 138831, \*24–26 (S.D. Cal. July 26, 2021) (approving settlement that  
 8 treated class members differently based on genuine differences between the strength of their  
 9 claims).

10 In addition, each class representative will request a \$2,500 service award. S.A. § 7.3. “Class  
 11 representative service awards are well-established as legitimate in the Ninth Circuit.” *Ramirez v.*  
 12 *Rite Aid Corp.*, 2022 U.S. Dist. LEXIS 109069, \*21 (C.D. Cal. May 3, 2022). A service award of  
 13 \$2,500 is reasonable and in line with awards approved by federal courts in California. *See, e.g., In*  
 14 *re Nat'l Collegiate Athletic Ass'n*, 2017 WL 6040065, at \*11 (N.D. Cal. Dec. 6, 2017) (approving  
 15 \$20,000 service awards to each class representative and collecting cases approving similar awards);  
 16 *Horton v. Cavalry Portfolio Servs., LLC*, 2020 WL 13327499, at \*1 (S.D. Cal. Oct. 13, 2020)  
 17 (\$10,000 service award).

18 **C. The Proposed Notice Plan is Consistent with Rule 23 and Due Process**

19 If the court determines that it will “likely be able to” approve the settlement, it must “direct  
 20 notice in a reasonable manner to all class members who would be bound” by the proposed  
 21 settlement. FED. R. CIV. P. 23(e)(1)(B). Class members are entitled to the “best notice that is  
 22 practicable under the circumstances” of any proposed settlement before it is finally approved by  
 23 the Court. FED. R. CIV. P. 23(c)(2)(B). “The notice may be by one or more of the following: United  
 24 States mail, electronic means, or other appropriate means.” *Id.* To comply with due process, notice  
 25 must be “the best notice practicable under the circumstances, including individual notice to all  
 26 members who can be identified through reasonable effort.” *Amchem Prods. v. Windsor*, 521 U.S.  
 27 591, 617 (1997). Notice must state in plain, easily understood language: (i) the nature of the action;  
 28

1 (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class  
 2 member may enter an appearance through an attorney if the member so desires; (v) that the court  
 3 will exclude from the class any member who requests exclusion; (vi) the time and manner for  
 4 requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule  
 5 23(c)(3). FED. R. CIV. P. 23(c)(2)(B). “Notice is satisfactory if it generally describes the terms of  
 6 the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come  
 7 forward and be heard.” *Toolajian*, 2020 U.S. Dist. LEXIS 250904, at \*31 (quoting *Churchill Vill.,*  
 8 *LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal quotation marks and citation  
 9 omitted)).

10       Here, and after a competitive bidding process, the parties have agreed to a robust notice  
 11 program to be administered by Kroll, a well-respected third-party class administrator that will use  
 12 all reasonable efforts to provide direct and individual notice to each potential Settlement Class  
 13 Member via email or mail. *See* S.A. § 1.5; Attorney Decl. ¶ 37 (describing bidding process). The  
 14 costs of administering the Settlement will be paid from the Settlement Fund. S.A. § 3.2. The Notice  
 15 and Claim Forms negotiated by the Parties are clear, concise and inform Settlement Class Members  
 16 of their rights and options under the Settlement, including detailed instructions on how to make a  
 17 claim, object to the Settlement, or opt-out of the Settlement. *See* S.A. Exhibits A, B, and C.

18       In addition to the direct notice, the Administrator will also establish a dedicated Settlement  
 19 Website and will maintain and update the website throughout the Claims Period, with the forms of  
 20 Short Notice, Postcard, Long Notice, and Claim Form approved by the Court, as well as the  
 21 Settlement Agreement. S.A. § 3.2(b). The Claims Administrator will also make a toll-free help line  
 22 staffed with a reasonable number of live operators available to provide Settlement Class Members  
 23 with additional information about the settlement. S.A. § 3.2(e).

24       Because the notice plan ensures that Settlement Class Members’ due process rights are  
 25 amply protected, this Court should approve it. *See* *Hartranft v. TVI, Inc.*, 2019 WL 1746137, at \*3  
 26 (C.D. Cal. Apr. 18, 2019).

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## 1 VI. CONCLUSION

2 The Court should (1) certify the Settlement Class and California Settlement Subclass, (2)  
 3 preliminarily approve the proposed settlement, and (3) approve the proposed notice plan.

4 Dated: November 15, 2024

5 Respectfully submitted,

6 By: /s/ M. Anderson Berry

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